

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 23, 2012

Bridget Bohac  
Office of the Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Application of White Stallion Energy Center, LLC for State Air Quality Permit 86088, HAP 28, PAL 26, and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1160; SOAH Docket No. 582-09-3008; TCEQ Docket No. 2009-0283-AIR

Dear Ms. Bohac:

Attached for filing please find the Executive Director's Brief on Remand in the above-referenced matter.

If you have any questions, please call me at 239- 6501.

Sincerely,

A handwritten signature in black ink, appearing to read "Booker Harrison".

Booker Harrison  
Betsy Peticolas  
Environmental Law Division

**SOAH DOCKET NO. 582-09-3008  
TCEQ DOCKET NO. 2009-0283-AIR**

<b>APPLICATION BY WHITE STALLION</b>	<b>§</b>	<b>BEFORE THE</b>
<b>ENERGY CENTER, LLC FOR</b>	<b>§</b>	
<b>PERMIT NOS. 86088, HAP28, PAL26,</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>AND PSD-TX-1160</b>	<b>§</b>	
<b>BAY CITY, MATAGORDA COUNTY</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**EXECUTIVE DIRECTOR'S BRIEF ON REMAND**

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this Brief on Remand and in support thereof shows the following:

**I. PROCEDURAL HISTORY.**

In the matter of *Environmental Defense Fund, Inc. v. Texas Commission on Environmental Quality*, Cause No. D-1-GN-11-000011, in the 261st Judicial District of Texas, Environmental Defense Fund, Inc. (EDF) filed its Motion for Remand under APA §2001.175(c). Following the briefing by the parties, the district court heard oral argument on May 24, 2011. On June 20, 2011, the district court issued an order remanding the matter back to the TCEQ for the taking of additional evidence (Order). White Stallion Energy Center, LLC (WSEC) and the TCEQ filed and briefed petitions for writs of mandamus which were ultimately denied by the Texas Supreme Court on December 16, 2011.<sup>1</sup> Therefore, the remand order of the district court is now before the Commission.

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<sup>1</sup> *In Re Texas Commission on Environmental Quality*, Case No. 11-0622 (Tex. - December 16, 2011).

## II. STATUTORY AND RULE AUTHORITY.

This matter was remanded to the Commission by the district court pursuant to TEX. GOV'T CODE § 2001.175(c). That statute provides that the district court can order additional evidence be taken before an agency, if upon application by a party to submit additional evidence, the court is "...satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency... ." <sup>2</sup>

The Texas Clean Air Act (TCAA) provides the Commission with the legal authority to call and hold evidentiary hearings. <sup>3</sup> In doing so, the Commission has the authority to administer oaths, receive evidence, issue subpoenas, and make findings of fact and decisions related to the administration of the TCAA and TCEQ rules. The TCAA also authorizes the Commission to delegate this authority to hold a hearing to one or more commissioners, the executive director, or one or more commission employees. <sup>4</sup> Separately, the Texas Water Code allows the Commission to delegate to an administrative law judge (ALJ) of the State Office of Administrative Hearings "the responsibility to hear any matter before the commission... ." <sup>5</sup>

TCEQ rules provide for an evidentiary hearing to be held before one or more commissioners and that Chapter 80 of TCEQ rules would apply to such a proceeding. <sup>6</sup> With respect to delegation to SOAH, § 80.6 sets out the procedure for referring a matter to SOAH and specifies that only issues referred by the commission may be considered in the hearing. <sup>7</sup>

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<sup>2</sup> TEX. GOV'T CODE § 2001.175(c).

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 382.029.

<sup>4</sup> TEX. HEALTH & SAFETY CODE § 382.030

<sup>5</sup> TEX. WATER CODE § 5.311.

<sup>6</sup> 30 TEX. ADMIN. CODE § 10.8.

<sup>7</sup> 30 TEX. ADMIN. CODE § 80.6(d).

### III. PROCEDURAL ASPECTS OF THE REMAND.

Given the above noted statutes and rules, the Commission has the authority in both statute and rule to either hold a hearing to take additional evidence consistent with the district court's Order, or refer the matter to SOAH to take such evidence. If the Commission refers the matter to SOAH, the Commission has the authority to identify the issues for the hearing before the ALJ. In either instance, TCEQ rules provide that the burden of proof is on the moving party by a preponderance of the evidence.<sup>8</sup> In a contested case hearing on an application for an air authorization, the applicant is the moving party and carries the burden of proof to demonstrate that the application meets all the relevant requirements of state and federal statutes and rules. However, in the remand proceeding before the commission, the moving party is EDF. Therefore, TCEQ rules provide for EDF, as the moving party, to open and close and present evidence to meet its burden of proof.<sup>9</sup> Given these circumstances, the conforming adjustment to the TCEQ rules on order of presentation would have EDF presenting its additional evidence under the standards in TEX. GOV'T CODE § 2001.175(c), followed by the applicant, the public interest counsel, and the executive director.<sup>10</sup> Furthermore, as noted in the next section of this brief on Scope of the Remand, beyond the actual October 25, 2010 site plan discussed in the May 24, 2011 hearing, any additional evidence must meet the two requirements in § 2001.175(c), specifically, that the evidence is material, and there are good reasons why the evidence was not considered before the agency.<sup>11</sup> Therefore, it would be permissible for the agency to consider the matter entirely by written submission.<sup>12</sup> In the alternative, it would also appear permissible for

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<sup>8</sup> 30 TEX. ADMIN. CODE § 80.17(a).

<sup>9</sup> 30 TEX. ADMIN. CODE § 80.117.

<sup>10</sup> See 30 TEX. ADMIN. CODE § 80.117(b).

<sup>11</sup> *San Diego Indep. Sch. Dist. v. Central Educ. Agency*, 704 S.W.2d 912, 914 (Tex. App. – Austin 1986, reh. denied)

<sup>12</sup> A somewhat analogous process would be motions for summary disposition pursuant to 30 TEX. ADMIN. CODE § 80.137.

the Commission to provide for a limited discovery opportunity, in order to put the evidence for which this matter was remanded into a meaningful context.<sup>13</sup>

### III. SCOPE OF THE REMAND.

The first provision of the district court's order states that "...pursuant to Texas Government Code § 2001.175(c), this matter be remanded for the taking of additional evidence on the October 25, 2010 site plan submitted by WSEC to the U.S. Army Corps of Engineers ("Site Plan 4") and on its impacts on WSEC's TCEQ air permit application under applicable law."<sup>14</sup> Therefore, by the specific terms of the order, the scope of the remand hearing is limited to Site Plan 4 and its impacts on WSEC's air permit application. Beyond the actual document that is Site Plan 4, any further evidence the moving party offers must meet the requirements in the statute and the moving party must make a showing, specifically, that the additional evidence is material and that there were good reasons for the failure to present the evidence before the agency.<sup>15</sup>

With respect to Site Plan 4 and any other additional evidence, the ED maintains the same position since the contested case hearing, which is that the air permit application submitted to the TCEQ, reviewed by the ED staff, and upon which the draft permit was predicated, has not changed. The Air Permits Division considers whether the representations made by the applicant in its air permit application will meet the requirements of the Federal and Texas Clean Air Acts. Furthermore, when reviewing an air permit application, the Air Permits Division is not required to, and does not consider, the entire universe of permits or other

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<sup>13</sup> While the *San Diego* opinion supports the proposition that the district court must be satisfied the additional evidence meets the two requirements of the statute, the district court in this matter did not foreclose the possibility of additional discovery. Transcript of Oral Argument on Motion to Remand, Cause No. D-1-GN-11-000011, May 24, 2011, at 114:14-17 (THE COURT: ... "My point about that is, if there is to be discovery, it could be – if it's remanded to the ALJ, they can decide what to do with it. I don't have to decide that."), and 114:24-115:1 (THE COURT: ... "What you do about that new evidence, what more evidence you might need, whether you need additional discovery is not for me to decide.")

<sup>14</sup> Order, ¶ 1, p. 2.

<sup>15</sup> See fn. 11, *supra*.

authorizations the applicant is required to obtain, whether local, state or federal, before approving the air quality authorization. It is irrelevant to the validity of the air authorization whether the applicant submits conflicting information in other media applications. The relevant issue is whether the facility is built as specified in the air application or, if not, the necessary conforming changes<sup>16</sup> are subsequently made to the air application or authorization, the process for which is found in TCEQ rules.<sup>17</sup>

#### IV. CONCLUSION

Based on the foregoing, the Commission has the authority to consider the remand or refer the matter to SOAH. The ED maintains his position that the air permit application submitted to the TCEQ, reviewed by the ED staff, and upon which the draft permit was predicated, has not changed. Therefore, the air quality authorization issued by the Commission remains valid subject to the underlying appeal.

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<sup>16</sup> While not an issue in briefing and argument at the district court, for completeness, the ED notes that the extent of those conforming changes may result in an enforcement action.

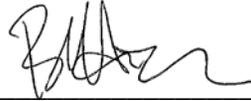
<sup>17</sup> 30 TEX. ADMIN. CODE § 116.116 includes the rules regarding, among other things, representations and conditions, permit amendments, and permit alterations. It is common for air quality permits to include a special condition that requires submission of final plans and engineering specifications not later than thirty days prior to start up. In 2008 and 2009, the commission and ultimately the district court, respectively, upheld a permit alteration that was submitted to comply with a similar permit special condition. In the matter of the *Application of Sandow Power Company, LLC* for TCEQ Air Quality Permit No. 48437, a motion to overturn the Commission's decision to issue the permit was overruled by operation of law on September 5, 2008. *Neighbors for Neighbors and Public Citizen, Inc. v. Texas Commission on Environmental Quality*, Cause No. D-1-GN-08-002283, in the 353rd Judicial District, Final Judgment, November 25, 2009.

Respectfully submitted,

Texas Commission on Environmental Quality  
Mark R. Vickery, P.G., Executive Director

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REPRESENTING THE EXECUTIVE DIRECTOR  
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served on the following by the method indicated on this 23rd day of January 2012.



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**Booker Harrison, Senior Attorney  
Betsy Peticolas, Staff Attorney  
Environmental Law Division**

**Service List for White Stallion Energy Center, L.L.C.**  
**SOAH Docket No. 582-09-3008; TCEQ Docket No. 2009-0283-AIR**

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